18-635

Mr. Justice Davis

I don't know

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~384~~ 771

THOMAS J. BARTHOLOW, JAMES W. LEWIS, BENJAMIN W. LEWIS, JR., AND JOHN D. PERRY, PLAINTIFFS IN ERROR,

vs.

WILLIAM C. BEAN, ASSIGNEE OF CHARLES S. KINTZING, BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED MAY 14, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 384.

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1 UNITED STATES OF AMERICA,
Districts of Missouri, sct:

Pleas before the honorable the circuit court of the United States for the districts of Missouri. October term, 1871.

WILLIAM C. BEAN, ASSIGNEE, &C., DEFENDANT in error.
vs.
THOMAS J. BARTHOLOW ET AL., PLAINTIFFS IN error.

Be it remembered that, on the second day of October, A. D. eighteen hundred and seventy-one, there was filed in the circuit court of the United States for the districts of Missouri a transcript of proceedings had in the district court of the United States for the eastern district of Missouri, in the above-entitled case, which transcript is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States for the eastern district of Missouri.

2 WILLIAM C. BEAN, ASSIGNEE IN BANKruptcy of Charles S. Kintzing, bankrupt, plaintiff.
ag'st
THOMAS J. BARTHOLOW, JAMES W. LEWIS, Benjamin W. Lewis, jun., and John D. Perry, defendants.
In bankruptcy. (Debt.)

Be it remembered that, on the third day of March, in the year of our Lord one thousand eight hundred and seventy, there was filed in the office of the clerk of the district court of the United States for the eastern district of Missouri, a declaration in debt in the above entitled case, which declaration is in the words and figures following, to wit:

Declaration.

United States district court, east. dist. of Missouri.

IN THE MATTER OF CHARLES S. KINTZING, bankrupt. In bankruptcy.

William C. Bean, assignee of the estate and effects of Charles S. Kintzing, a bankrupt, according to the United States statute in force concerning bankruptcy, complains of Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, junior, and John D. Perry, of a plea that they render to the said William C. Bean, assignee as aforesaid, the sum of
3 three thousand dollars lawful money, which they owe to and unjustly detain from him.

For that, whereas heretofore, to wit, on the 17th day of September, A. D. 1869, a creditor's petition in bankruptcy was filed in the clerk's office of the United States district court for the eastern district of Mis-

souri, against said Charles S. Kintzing, and said Charles S. Kintzing was thereafter duly adjudged a bankrupt, and plaintiff was duly elected and approved assignee of said bankrupt, and the estate and effect' of said bankrupt were duly assigned to said plaintiff. And the said plaintiff further says that, at the date hereinafter named, said Kintzing was carrying on business under the style of Charles S. Kintzing & Company, and was insolvent, and was indebted to defendants in the sum of two thousand five hundred dollars, and interest thereon, being amount of, and interest due on, a certain note signed by said Kintzing, and held by defendants; that defendants were copartners doing business under the style and firm of Bartholow, Lewis & Company; that within four months before the filing of said petition in bankruptcy against said Kintzing, to wit, on the ninth day of August, A. D. 1869, said Kintzing made a payment of the sum of two thousand five hundred ninety-seven and $\frac{50}{100}$ dollars, being the amount of and interest then due on
4 the note aforesaid, to the said defendants, with a view to give a preference to them, the said defendants; and the said plaintiff further says that defendants, at the date last aforesaid, had reasonable cause to believe that said Kintzing was then insolvent, and that said payment was made in fraud of the provisions of the bankrupt laws then in force; and plaintiff further says the said payment was made by said Kintzing, and accepted by said defendants, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute an action hath accrued to the said plaintiff, to have of and from the said defendants, the said sum of two thousand five hundred dollars, with interest thereon from said ninth day of August, A. D. 1869. Yet, the said defendants have not paid the said sum of two thousand five hundred ninety-seven and $\frac{50}{100}$ dollars above demanded, or any part thereof, to said plaintiff, as assignee as aforesaid; but have neglected and refused, and still neglect and refuse so to do, to the damage of the said plaintiff, as assignee as aforesaid, in the sum of three thousand dollars; and therefore he brings his suit.

EDMUND T. ALLEN,
Pl'ff' Att'y.

5 And thereupon, on said third day of March, A. D., 1870, the following proceedings were had in said district court, in said case, to wit:

WILLIAM C. BEAN, ASSIGNEE OF CHARLES S. Kintzing, bankrupt, plaintiff,
against
THOMAS J. BARTHOLOW, JAMES W. LEWIS, Benjamin W. Lewis, junior, and John D. Perry defendants.
} In bankruptcy.

Declaration filed.

AT ST. LOUIS, IN SAID DISTRICT,
Thursday, 3d March, A. D. 1870.

This day comes William C. Bean, assignee aforesaid, by attorney, and files his declaration in debt against the said defendants.

Summons ordered.

And on motion of said attorney, it is ordered by the court that a summons be issued in this case against said defendants, returnable on Thursday, the tenth day of March, A. D. 1870.

And in accordance with the foregoing order there was issued on the

said 3d day of March, A. D. 1870, a summons against the defendants in said case, which summons is in the words and figures following, to wit:

Summons.

EASTERN MISSOURI DISTRICT, *set.:*

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, junior, and John D. Perry,
6 that they be and appear before the honorable district court of the United States for the eastern district of Missouri, to be holden at the city of St. Louis, in and for said district, on the tenth day of March, 1870, then and there to answer unto William C. Bean, assignee in bankruptcy of Charles S. Kintzing, bankrupt, in a plea of debt to the damage of said plaintiff in the sum of three thousand dollars. Hereof fail not, and have you then there this writ.

Witness the Honorable Samuel Treat, judge of the district court of the United States for the eastern district of Missouri, the third day of March, A. D. eighteen hundred and seventy.

Issued at office, in the city of St. Louis, under the seal of said district court, the day and and year last aforesaid.

[SEAL.] (Signed) BEN. F. HICKMAN, *Clerk.*

And afterwards, to wit, on the 9th day of March, A. D. 1870, the marshal of the United States for said district returned into court the said summons, issued as aforesaid, together with his return thereon, which return is in the words and figures following, to wit:

Return on summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by reading the same to the within-named Thomas J. Bartholow and John D. Perry, at St. Louis, in said district,
7 March 4, 1870, and by reading the same to the within-named Benjamin W. Lewis, at St. Louis, in said district, March 9, 1870; the within-named James W. Lewis could not be found within the eastern district of Missouri.

(Signed) C. A. NEWCOMB,
U. S. Marshal, E. D. of Mo.,
By J. SAUER, *Deputy.*

And afterwards, to wit, at a regular stated term of said district court, begun and holden at the city of St. Louis, in said district, on the third Monday, the 16th day of May, A. D. 1870, the following further proceedings were had in said case on Monday the 14th day of November, A. D. 1870, to wit:

WILLIAM C. BEAN, ASSIGNEE OF CHARLES S. Kintzing, bankrupt, plaintiff, *ag'st* THOMAS J. BARTHOLOW ET AL., DEFENDANTS. } In bankruptcy.

Answer of def't withdrawn & plea filed.

AT ST. LOUIS, IN SAID DISTRICT,
Monday, 14th November, A. D. 1870.

This day come the parties, by their respective attorneys, and with the leave of court, the attorney for plaintiff thereto consenting, said defend-

ants withdraw their answer heretofore filed herein and file their plea of nil debet to the action of plaintiff herein against them.

Similiter filed.

To which plea plaintiff files his similiter.

And the said plea filed by said defendants on said 14th day of November, A. D. 1870, is in the words and figures following, to wit:

8 *Plea.*

In the district court of the United States for the eastern district of Missouri.

IN THE MATTER OF CHARLES S. KINTZING, bankrupt. } In bankruptcy.

And now comes Thomas J. Bartholow, James W. Lewis, Benj. W. Lewis, j'r, and John D. Perry, comprising firm of Bartholow, Lewis & Co., by their attorney, and defend the wrong complained of by plaintiff, and say that they do not owe, or unjustly detain from plaintiff, the sum of three thousand dollars, or any other sum, and of this they put themselves upon their country.

(Signed) R. H. SPENCER,
Att'y for Def'ts.

And the said similiter filed by said plaintiff on said 14th day of November, A. D. 1870, is in the words and figures following, to wit:

Similiter.

United States district court, eastern district of Missouri, ss.—In bankruptcy.

WILLIAM C. BEAN, ASSIGNEE, *vs.* THOS. J. BARTHOLOW ET AL. } In the matter of Charles S. Kintzing, bankrupt.

And the said plaintiff as to the plea of the said defendants by them pleaded, and whereof they have put themselves upon the country, doth the like.

(Signed) EDMUND T. ALLEN,
Att'y for Pl't'ff.

9 And on the 19th day of September, A. D. 1871, there was filed in the clerk's office of said district court a waiver of jury, which is in the words and figures following, to wit:

Waiver of jury.

W'M C. BEAN, ASSIGNEE, *vs.* THO'S J. BARTHOLOW ET AL.

United States district court, east. dist. Mo.

The parties to the above-entitled cause hereby waive a jury therein,

and consent that the same may be tried by the court sit'ing as a jury.

(Signed) EDMUND T. ALLEN,
Att'y for Pl'ff.
RICH'D H. SPENCER,
Att'y for Def'ts.

And at a regular stated term of this district court, begun and holden at the city of St. Louis, in said district, on Monday, the 15th day of May, A. D. 1871, the following further proceedings were had on Tuesday, the 19th day of September, in said last-mentioned year, to wit:

Trial of case by the court.

IN CASE NO. 1930 OF WILLIAM C. BEAN, assignee, &c., plaintiff, *ag'st* THOMAS J. BARTHOLOW ET AL., DEFENDants.	No. 1930. Debt.

This day comes the plaintiff, by Edmund T. Allen, esquire, his attorney, and also the defendants, by Richard H. Spencer, esquire, their attorney, and file their stipulation in writing, waiving a jury in this case, and consenting that said case may be tried by the court without the intervention of a jury, and said case being regularly called for trial, and both parties being ready, the same was thereupon tried by and submitted to the court without the intervention of a jury, upon the pleadings and proofs therein.

Finding.

And the court having duly considered the same, and being fully advised in the premises, finds the issues joined herein for the plaintiff, and files of record its special finding of the facts in said case, and thereupon orders that judgment be entered in favor of said plaintiff for the sum of twenty-nine hundred and nine dollars and twenty cents, and costs of suit.

Judgment.

It is therefore now considered by the court that the plaintiff, William C. Bean, assignee of the estate and effects of Charles S. Kintzing, a bankrupt, recover against the defendants, Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, junior, and John D. Perry, the sum of ($2,909.20,) twenty-nine hundred and nine dollars and twenty cents, being the amount of the damages so as aforesaid by the court found to be due said plaintiff, and also the cost in this behalf expended, and that execution for said sum and costs be issued in said case.

And the said special finding, filed as aforesaid, is in the words and figures following, to wit:

11 *Special finding.*

WILLIAM C. BEAN, ASSIGNEE OF CHARLES S. KINTZING,
vs.
THOMAS J. BARTHOLOW, JAMES W. LEWIS, Ben. W. Lewis, j'r, John *B.* Perry.
} In bankruptcy.

United States district court, eastern district of Missouri.

In the above-entitled cause, submitted to the court without the intervention of a jury, the court makes the following special finding: That a creditor's petition in bankruptcy was filed against Charles S. Kintzing, in the clerk's office of this court, on the 17th day of September, A. D. 1869, and that said Kintzing was, on said petition, duly adjudicated a bankrupt, and that plaintiff was, on the 4th day of January, A. D. 1870, duly appointed and approved as assignee in bankruptcy of said Kintzing; that defendants were, during the year A. D. 1869, copartners, doing a banking business in St. Louis, in said district, and that said Kintzing had kept an account with them; that Charles S. Kintzing & Co., a firm composed of said Charles S. Kintzing and one Malcolm A. Lindsley, had discounted their note for twenty-five hundred dollars, of date January 15th, 1869, payable sixty days after date, to the order of J. B. Wilcox, and endorsed by said Wilcox, at the banking-house of defendants; that on the 15th day of February, A.
12 D. 1869, said Charles S. Kintzing called together his individual and copartnership creditors and entered into a *composition* agreement with the most of them in the following terms: "Article of agreement, made and entered into on this 15th day of February, A. D. 1869, by and between Charles S. Kintzing & Co., of the city of St. Louis, and his creditors, witnesseth, that we, the undersigned creditors of said Charles S. Kintzing & Co., for and in consideration of one dollar to each of us paid by said firm, and for divers other good and valuable considerations, agree to accept in full payment and satisfaction seventy cents of the dollar for the entire indebtedness of said firm to us respectively, as shown by the amounts set opposite our signatures hereto, to be divided up into three equal payments at six, (6,) twelve, (12,) and eighteen (18) months respectively from the date hereof, without interest, and to be evidenced by three negotiable notes of Charles S. Kintzing & Co., of even date herewith, and on the payment of which said firm is to be released from all liability on account of said indebtedness. And be it further known that we have entered into this compromise with said firm of Charles S. Kintzing & Co., after hearing and seeing
13 a statement of Messrs. Kintzing & Co.'s books, assets, & effects, and find that it is the best, in our judgment, that can be done for the interest of all concerned. And further, that we have full confidence in the integrity of Charles S. Kintzing, and his ability to settle up the business better than any one we could appoint.

"But it is further expressly agreed and understood that this *composition* is not to be binding on any one unless agreed to and signed by all of the creditors of said firm.

"In witness whereof we have hereto set out respective names and desire the co-operation of all the creditors with us in this compromise."

That said agreement was thereafter executed by a large number of the creditors of said Charles S. Kintzing & Co., and, among them, by the firm of Lewis Brothers & Co., defendant Benjamin W. Lewis, j'r,

being a member of said last-named firm; and by the firm of Wilcox & Loughran, said J. B. Wilcox being a member of the last-named firm; that, before all who did sign said agreement had signed the same, said firm of Charles S. Kintzing was dissolved by the withdrawal of Malcolm A. Lindsley, who, at that time, was largely indebted to the
14 firm—said Kintzing, at the date of said dissolution, viz, on or about February 27th, A. D. 1869, taking all the assets and assuming all the indebtedness of said firm; that defendants did not, either as a firm or individually, sign said compromise agreement, but well knew that such an agreement had been entered into by the other creditors; that, on or before the 19th day of March, A. D. 1869, at which time said note, discounted at the banking house of defendants, matured, J. B. Wilcox, the endorser thereon, being solvent, waived protest and notice thereof; that said note remained unpaid in the hands of defendants until about the ninth day of August, A. D. 1869, at which time Charles S. Kintzing paid the same to defendants, with interest to that date, viz, the sum of two thousand five hundred ninety-seven $\frac{50}{100}$ dollars; that, at the time of said payment of said note, said Kintzing was hopelessly insolvent, even under the terms of said agreement; that, on the 18th day of August, A. D. 1869, the paper given by said Kintzing pursuant to the terms of said compromise, to the amount of about $25,000, became due, and was unpaid up to the commencement of proceedings in bankruptcy against Kintzing as aforesaid.

15 The principal and interest on said sum, so paid to defendants, amount to 2,909$\frac{20}{100}$ dollars.

The court, upon the foregoing facts, finds that the plaintiff is entitled to recover of the defendants said sum of 2,909$\frac{20}{100}$ dollars, and orders judgment accordingly.

And at said last-mentioned regular stated term of this district court, begun and holden as aforesaid, the following further proceedings were had on Tuesday the 26th day of September, in said last-mentioned year, to wit:

Approval of bond, &c.

IN CASE NO. 1930, OF WILLIAM C. BEAN, ASSIGNEE, &c., plaintiff, *ag'st* THOMAS J. BARTHOLOW ET AL., DEFENDANTS.	No. 1930. Debt.

This day come the defendants, by Richard H. Spencer, esquire, their attorney, and the said defendants having sued out a writ of error in this cause from the circuit court of the United States, in and for the districts of Missouri, the said defendants now file their bonds as required by law on the allowance of such writ of error, with Thomas J. Bartholow and Washington H. Chick as sureties, which bond is approved by the court, and ordered to be made part of the record in said case.

And the said bond, filed as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Thomas J. Bartholow
16 and Washington H. Chick, are held and firmly bound unto Will-

iam C. Bean, assignee in bankruptcy of Charles S. Kintzing, a bankrupt, in the full and just sum of four thousand dollars, to be paid to the said William C. Bean, assignee as aforesaid, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas, lately, at the May term, A. D. 1871, of the district court of the United States in and for the eastern district of Missouri, in a suit depending in said court between William C. Bean, assignee of Charles S. Kintzing, in bankruptcy, plaintiff, against Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, junior, and John D. Perry, defendants, judgment was rendered against the said Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, junior, and John D. Perry, and the said defendants, Thomas J. Bartholow et al., having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William B. Bean, assignee
17 as aforesaid, citing and admonishing him to be and appear at a circuit court of the United States for the districts of Missouri, to be holden at Saint Louis, Missouri, the first Monday of October next: Now, the condition of the above obligation is such that if the said defendants, Thomas J. Bartholow et al., shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THOMAS J. BARTHOLOW. [SEAL.]
WASHINGTON H. CHICK. [SEAL.]

Sealed and delivered in presence of—
R. H. SPENCER.

Approved by—

SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true transcript of the record and proceedings in case No. 1930, A. D. 1870, of William C. Bean, assignee of Charles S. Kintzing, bankrupt, plaintiff, against Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, junior, and John D. Perry, defendants, as fully as the same remains on file and of record in said case in my office.

18 In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said district, this 27th day of September, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.

And afterwards, at a regular stated term of said circuit court of the United States for the districts of Missouri, begun and holden at the city of St. Louis, in said districts, on the first Monday, the second day, of October, A. D. 1871, the following proceedings were had in said case on said last-mentioned day, to wit:

WILLIAM C. BEAN, ASSIGNEE, &C., DEFENDANT in error,
vs.
THOMAS J. BARTHOLOW ET AL., PLAINTIFFS in error.

Writ of errors to U. S. district court, east. dist. Missouri.

Assignment of errors filed.

This day come the plaintiffs in error, by their attorney, Richard H. Spencer, esquire, and file their assignment of errors herein.

The assignment of errors filed as aforesaid is in the words and figures following, to wit:

Assignment of errors.

19 In the circuit court of the United States for the districts of Missouri.

THOMAS J. BARTHOLOW ET AL., PLAINTIFFS IN error,
vs.
WILLIAM C. BEAN, ASSIGNEE OF C. S. KINTZING, defendant in error.
} In error.

October term, in the year of our Lord eighteen hundred and seventy-one.

And now comes the said plaintiffs in error, by their attorney, Rich'd H. Spencer, and say that, in the record and proceedings aforesaid, there is manifest error in this, to wit:

That the district court gave an improper and illegal declaration of law as applicable to said cause; that there is also manifest error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid given was given for the said defendant against the said plaintiffs, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants; and the said plaintiffs pray that the judgement aforesaid may be reversed, annulled, and altogether held for nothing; and that they may be restored to all things which they have lost by occasion of the said judgment.

RICH'D H. SPENCER,
Att'y for Pl'ffs in Error.

20 And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in said case on Tuesday, the seventeenth day of October, in said year, to wit:

Case submitted and taken under advisement.

WILLIAM C. BEAN, DEFENDANT IN ERROR,
vs.
THOMAS J. BARTHOLOW ET AL., PLAINTIFFS in error.

Writ of error to U. S. district court, eastern district of Missouri.

This day come the parties, by their respective attorneys, and this case was submitted to the court upon the record and proceedings in the dis-

trict court of the United States for the eastern district of Missouri; and upon the case as made out and presented to this court, the court, not being fully advised in the premises, takes further time to consider thereof.

MEMORANDUM.—His honor Judge Treat did not sit or take part in the proceedings in this case.

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in said case on Wednesday, the eighteenth day of October, in said year, to wit:

WILLIAM C. BEAN, ASSIGNEE, &C., DEFENDANT in error,
vs.
THOMAS J. BARTHOLOW ET AL., PLAINTIFFS in error.

Writ of error to U. S. district court, eastern district of Mo.

21 *Joinder in error filed nunc pro tunc.*

This day comes the defendant in error, by his attorney, and presents to the court his joinder in error herein, and asks that he be now allowed to file the same as of date the second day of October last. And thereupon it is ordered that said joinder be filed nunc pro tunc, which is now accordingly done.

The joinder in error, filed as aforesaid, is in the words and figures following, to wit:

United States circuit court for the districts of Missouri.

W'M C. BEAN, ASSIGNEE, &C., *D. E.*
vs.
THOMAS J. BARTHOLOW ET AL., *P E.* } In bankruptcy on writ of error.

Joinder in error.

And afterwards, on the first Monday in October term, in the year of our Lord one thousand eight hundred and seventy-one, the said W'm C. Bean, by his attorney, Edmund T. Allen, freely comes here into court and says that there is no error, either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and he prays that the said circuit court now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above as-
22 signed for error; and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

EDMUND T. ALLEN,
Att'y for Def'd't in error.

And afterwards, at said last-mentioned regular stated term of said court, the following further proceedings were had in the said case on Thursday, the nineteenth day of October, in said year, to wit:

Judgment of district court affirmed, &c.

WILLIAM C. BEAN, ASSIGNEE, &C., DEFENDANT in error,
vs.
THOMAS J. BARTHOLOW ET AL., PLAINTIFFS IN error.

Writ of error to U. S. dist. court, eastern district of Mo.

This day come again the parties by their respective attorneys, the plaintiffs in error, by Richard H. Spencer, esquire, and the defendant in error by Edmund T. Allen, esquire, and this case having been submitted to the court at a former day of this term, for a judgment upon the record and proceedings in this case in the district court of the United States for the eastern district of Missouri, and upon the case as made out and presented to this court, the court being now fully advised of and concerning the same, it is ordered and adjudged that the judgment of said district court rendered in this case be, and the
23 same is now hereby, affirmed; and further, that the plaintiffs in error, Thomas J. Bartholow, Benjamin W. Lewis, j'r, James W. Lewis, and John D. Perry, pay the costs in this behalf expended; and that a fee-bill be issued for such costs. And it is further ordered that a certified copy of this judgment be transmitted to said district court for its action thereon.

MEMORANDUM.—His Honor Judge Treat, did not sit or take part in the disposition of this case.

And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in said case on Tuesday, the thirty-first day of October, in said year, to wit:

Supersedeas granted. Bond approved.

WILLIAM C. BEAN, ASSIGNEE, &C., DEFENDANT in error,
vs.
THOMAS J. BARTHOLOW ET AL., PLAINTIFFS IN error.

Writ of error to United States district court, eastern district of Mo.

Ordered, that a supersedeas be granted staying all further proceedings upon the judgment heretofore rendered herein, a writ of error having been allowed to the Supreme Court of the United States, and a bond with sureties having been executed and approved, as required by law.

The bond referred to in the last preceding order is in the words and figures following to wit:

24 *Appeal bond.*

Know all men by these presents, that we, Thomas J. Bartholow, as principal, and Washington H. Chick, as surety, are held and firmly bound unto William C. Bean, assignee of the estate and effects of Charles S. Kintzing, bankrupt, in the full and just sum of four thou-

sand dollars, to be paid to the said William C. Bean, assignee as aforesaid, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at the October term, A. D. 1871, of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between William C. Bean, assignee as aforesaid, defendant in error, and Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, j'r, and John D. Perry, plaintiffs in error, judgment was rendered against the said Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, j'r, and John D. Perry, plaintiffs in error aforesaid, and the said plaintiffs in error having obtained a writ of error of the
25 said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William C. Bean, assignee as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

THOMAS J. BARTHOLOW. [SEAL.]
WASHINGTON H. CHICK. [SEAL.]

Sealed and delivered in presence of—

Approved by—

ARNOLD KREKEL, *Judge.*

26

27 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of William C. Bean, assignee, &c., defendant in error, against Thomas J. Bartholow et al., plaintiffs in error, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said districts, this fifteenth day of November, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.]

AUSTIN DRAKE,
Clerk of said Court.

(Indorsed:) United States circuit court, districts of Missouri. William C. Bean, assignee, &c., against Thomas J. Bartholow et al. Duly certified transcript of the record and proceedings in the above-entitled cause.

28 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States, to the honorable the judge of the circuit court of the United States for the districts of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the October term of said court, A. D. 1871, between William C. Bean, assignee of the estate and effects of Charles S. Kintzing, bankrupt, defendant in error, and Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, j'r, and John D. Perry, plaintiffs in error, a manifest error hath happened, to the great damage of the said Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, j'r, and John D. Perry, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, chief justice of the said Supreme Court, this thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-one.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

ARNOLD KREKEL, *Judge.*

29 UNITED STATES OF AMERICA,
Districts of Missouri, ss:

In obedience to the within writ of error I herewith forward and transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case.

15th November, 1871.

AUSTIN DRAKE,
Clerk of the Circuit Court of the United States for the Districts of Missouri.

(Indorsed:) W'm C. Bean, assignee, D. E., vs. Thomas J. Bartholow et al., P. E. Writ of error.

30 The United States of America to William C. Bean, assignee of the estate and effects of Charles S. Kintzing, bankrupt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first

Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein William C. Bean, assignee as aforesaid, is defendant in error, and Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, j'r, and John D. Perry are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, one of the judges of the circuit court of the United States for the districts of Missouri, this thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-one.

ARNOLD KREKEL, *Judge.*

31 Service of the within citation waived.

EDMUND T. ALLEN
Attorney for W. C. Bean, assignee of C. S. Kintzing.

(Indorsed:) W'm C. Bean, assignee, D. E., vs. Tho's J. Bartholow et al., P. E. Citation.

(Indorsement on cover:) No. 384. Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, jr., and John D. Perry, plaintiffs in error, vs. William C. Bean, assignee of Charles S. Kintzing, bankrupt. Missouri C. C. U. S. Filed 14th May, 1872.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1873.

No. 171.

Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, Jr., and John D. Perry, Plaintiffs in Error.

vs.

William C. Bean, Assignee of Charles S. Kintzing, Bankrupt, Defendant in Error.

In Error to the Circuit Court of the United States, for the Districts of Missouri.

Statement of the case Assignment of Error, Brief and Argument of Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

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No. 171.

Thomas J. Bartholow, James W. Lewis, Benjamin W. Lewis, Jr., and John D. Perry, Plaintiffs in Error.

vs.

William C. Bean, Assignee of Charles S. Kintzing, Bankrupt, Defendant in Error.

In Error to the Circuit Court of the United States, for the Districts of Missouri.

STATEMENT.

Although it does not appear so in the transcript of the record, there were, in fact, two trials of this case before the District Court of the United States, for the Eastern District of Missouri. The first trial resulted in a judgment for the plaintiffs in error, defendants below, which, upon a writ of error to the Circuit Court, was reversed, and upon the case being remanded, at the second trial before the said District Court, upon the statement of facts, as set forth in the special finding by the Court, found upon the printed transcript of record pages 6 and 7, judgment was rendered in favor of the defendant in error, plaintiff below.

From that special finding, it appears that the defendant in error is the assignee in bankruptcy of Charles S. Kintzing, who was the successor of the firm of Charles S. Kintzing & Co., wholesale grocers, in the city of St. Louis, State of Missouri. The plaintiffs in error, under the name and style of Bartholow, Lewis & Co., were the local bankers of said firm of Charles S. Kintzing & Co.

On the 15th of January, 1869, a note for two thousand five hundred ($2,500) dollars, executed by Charles S. Kintzing & Co., and endorsed by one Jeremiah B. Wilcox, payable in sixty (60) days, was discounted by the plaintiffs in error, defendants below, and the proceeds of said note placed to the credit of said Charles S. Kintzing & Co.

On the 15th of February, 1869, the firm of Charles S. Kintzing & Co., composed of said Charles S. Kintzing and Malcolm A. Lindsley, being largely indebted, and having stopped payment, called a meeting of their creditors in the city of St. Louis. A statement of their financial affairs was presented at the meeting, showing liabilities to the amount of $179,299.54, and assets to the amount of $204,602.80.

For the purpose of making a compromise with their creditors, an agreement in these words was prepared and presented for signature to such creditors:

"Articles of agreement, made and entered into this 15th day of February, 1869, by and between Charles S. Kintzing & Co., of the city of St. Louis, and his creditors. Witnesseth, that we, the undersigned creditors of said Charles S. Kintzing & Co., for and in consideration of one dollar, to each of us paid by said firm, and for divers other good and valuable considerations, agree to accept, in full payment and satisfaction, seventy (70) cents on the dollar, for the entire indebtedness of said firm to us respectively, as shown by the amounts set opposite our

signatures hereto, to be divided up into three equal payments, at six (6), twelve (12), and eighteen (18) months respectively, from the date hereof, without interest, and is evidenced by three (3) negotiable notes of Charles S. Kintzing & Co., of even date herewith, and, on the payment of which, said firm is to be released from all liability on account of said indebtedness. And be it further known, that we have entered into this compromise with said firm of Charles S. Kintzing & Co., after hearing and seeing a statement of Messrs. Kintzing & Co.'s books, assets, and effects, and find that it is the best, in our judgment, that can be done for the interest of all concerned. And further, that we have full confidence in the integrity of Charles S. Kintzing, and his ability to settle up the business better than any one else we could appoint. But it is further expressly agreed and understood, that this compromise is not to be binding on any one, unless agreed to and signed by all of the creditors of said firm. In witness whereof, we have hereto set our respective names, and desire the co-operation of all the creditors with us in this compromise."

This composition agreement was ultimately signed by creditors, the aggregate of whose debts, as set opposite their names, amounted to $153,558.21. The other creditors, mostly small, never signed it. The plaintiffs in error refused to sign the composition deed.

When the note aforesaid became due, on the 19th of March, 1869, the endorser, Wilcox, waived notice and protest, and the payment of the note was extended from time to time, and it was subsequently paid.

On or about the 27th of February, 1869, the firm of Charles S. Kintzing & Co., was dissolved by the withdrawal of Malcolm A. Lindsley, Kintzing taking all the assets and assuming all the indebtedness of said firm.

Kintzing kept on in business, under the composi-

tion agreement, and on the 9th of August, 1869, paid the note aforementioned, with interest, to the plaintiffs in error, the money being received by the teller in the usual course of business.

On the 17th of September, 1869, creditors holding some of the six month's compromise notes, signed Charles S. Kintzing & Co., and dated February 15, 1869, presented a petition thereon to the District Court of the United States, for the Eastern District of Missouri, and alleging various acts of bankruptcy and preferential payments on the part of Kintzing; and on said petition he was duly adjudicated a bankrupt. The defendant in error was, on the 4th of January, 1870. duly appointed and approved as assignee, and on the 3d of March, 1870, brought suit against the plaintiffs in error, defendants below, to recover back the amount of said note.

ASSIGNMENT OF ERROR.

Upon the special finding, the Court erred in giving judgment for the defendant in error, plaintiff below.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

Upon the first trial of this case before the District Court, it was decided in favor of the plaintiffs in error, defendants below, on the ground, "That the compromise agreement *was binding*, and had the effect to relieve Kintzing & Co. from the insolvent condition in which

they were when that instrument was made. That the extension it provided for, must be considered as relieving the debtors from a state of immediate insolvency."

Upon the second trial, the judgment of said District Court (special finding, Record, pp. 6 and 7), was rendered in accordance with the decision and opinion of the Circuit Court, given when the same was taken before that Court on a writ of error.

The Circuit Court decided in favor of the defendant in error, plaintiff below, on the ground "That a provision in a composition agreement, that 'it is not to be binding on any one unlesss agreed to and signed by all the creditors,' applies to secured as well as to unsecured creditors; and where this provision is not waived and the composition agreement is not signed by all, it does not have the effect to relieve the debtor from a state of insolvency within the meaning of the bankrupt act."

I.

1. There was nothing in the special finding of the District Court to show that the plaintiffs in error, defendants below, knew of the provisions of the composition deed.

But admitting that they did, the deed was not necessarily invalidated by the plaintiffs in error refusing to sign the same. Such an interpretation would be equivalent to ruling, that an embarrassed debtor *could not* compromise with his creditors, unless they all, without exception, joined in the compromise. It would destroy the right of a single creditor to compromise with his debtor.

Though the condition of the composition deed is in the following words:

"It is further expressly agreed and understood that this composition is not binding on any one unless agreed to and signed by all the creditors of said firm."

Yet, the true interpretation of the last clause would be, that the condition makes the deed *voidable*, not void. It admits of no other construction, otherwise the creditors would bar their own rights.

2. It will be seen from the composition deed that the creditors who signed it, had made an examination of the bankrupt's books, heard his statements, etc. They agreed to take 70 cents on the dollar for their claims, without interest. They had no security.

Why should the plaintiffs in error, holding secured paper, take 70 cents on the dollar, when their debt was worth dollar for dollar?

There is nothing in the special finding of the District Court to show that the creditors who signed the composition deed did not know of the existence of the demand of the plaintiffs in error. The presumption is, they did know. They heard Kintzing's statements, saw his books, and had sufficient confidence in him to allow him to settle up the business.

There was no concealment by Kintzing from his creditors of this secured debt.

The composition deed was subject to the inspection of the creditors at all times, and even if they did not have actual notice, prior to carrying out the provisions of the deed, they certainly are affected with constructive notice that the plaintiffs in error did not sign it.

It is said that the compromise agreement of February, was on the condition that all creditors should join. It is true, the plaintiffs in error did not sign it.

Yet, as the District Judge says, in his decision on the first trial, "The compromise was affected, its terms entered upon, and all parties thereto proceeded irrespective

of (plaintiffs in error) defendants. Under these circumstances they received payment of the note. If the other creditors were damnified, the result was the legitimate consequences of their own acts, which they must be presumed to have understood and assented to."

In this case, the creditors (a very large majority of them) signed the deed, acted under it, took notes for the amounts due them, at six, twelve and eighteen months, irrespective of the plaintiffs in error, defendants below, for nearly six months before this note was paid; and not until default was made in the payment of the six months notes, was it claimed that this deed was invalid.

3. If the creditors, signing and becoming parties to the agreement, knowing that the plaintiffs in error had not signed it, and would not, but notwithstanding this, entered upon and proceeded with the compromise, this we concede amounts to a *waiver* of this clause of the contract.

The conclusion then is irresistible, that the creditors, by their subsequent acts, *waived* the right of invalidating the compromise conferred upon them by the clause referred to, and in fact, made it an accomplished compromise.

In the case of Spottiswoode vs. Stockdale (Montagu on Composition, Ed. 1823, App. 125), 1 Cooper, 105. The Lord Chancellor says: "I take it to be quite clear, that, if the creditors are to execute a deed of assignment, by a time stated therein, and it is provided by the deed, that, in case they do not do so, that the deed shall be null and void, in case they do not execute the deed within that time, the deed is void at law. But it is the constant course of equity, that, if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, that a Court of Equity will also act

under it, and treat it as valid, whether such creditors have signed it or not."

See Exp. Kelner, Buck, 194.
Exp. Lowe, 1, G. and J., 81.
Exp. Shaw, 1, Madd., 590.

Forsyth, in his work on Composition, (Am. ed., 1843), p. 23, commenting upon the above decision, says:

"But although the Courts will uphold arrangements for composition against those who have directly or indirectly made themselves parties to them, yet they are jealous of any interference on their part which would have the effect of prejudicing the position of creditors, who may not have assented to the arrangement."

And in a note on same page.

"It will be seen, however, from the cases cited above, that even at law, the deed is not treated as void when the creditors have by their conduct, signified their acquiescence in it."

II.

The 35th section of the Bankrupt Act, under which this suit was brought, deals with preferences and fraudulent conveyances.

1. The intent of the bankrupt to prefer creditors in fraud of the act must be shown, to entitle the assignee to recover of the creditor so preferred, the value of the property so transferred.

Now, in this case, no such intention appears. And it cannot be doubted that Kintzing confidently believed after the compromise that he would be able to go on in business. And neither can it be doubted, that the

plaintiffs in error, believed from the compromise that Kintzing would be able to go on with his business.

2. The first part of the 35th section provides that any payment, pledge, assignment, transfer, or conveyance, by a person being insolvent or in contemplation of insolvency, if the person to whom the same is made, is "to be benefitted thereby, and has reasonable cause to believe such person to be insolvent, and that the same is made in fraud of the provisions of the law, shall be void; and the assignee is authorized to sue for and recover the value, from the person receiving the same, or so to be benefitted."

There is nothing in the special finding to show that the plaintiffs in error, knew of the insolvency, and, therefore, the payment to them was not a preference in fraud of the law; they were not the parties benefitted by the payment, as Wilcox's endorsement made them wholly safe, as he is admitted to have been entirely solvent, and able to meet any demands against him. It was, therefore, of no importance to the plaintiffs in error, defendants below, whether Kintzing paid the note, as they would have been paid by Wilcox.

This matter was fully discussed in the case of Ahl *et al.* vs. Thorner, (Ohio), 3 Nat. Bank. Reg., Page 29, where it was held that,

"When the endorser is solvent, the payment does not give a preference to the holder. The holder is not benefitted as he would have been paid at once by the endorser, when the note became due.

S. C., 2 Am. Law Times, 104.
S. C., 16 Pitts. Law Journal, 78.
S. C., 1 Chicago Law News, 337.

The note was paid at the banking house of the plaintiffs in error, defendants below.

If they had refused to receive payment when tendered at their bank, and the maker had turned out to be solvent, they would have refused at their peril. The endorser would have been released.

In the case of Wadsworth, assignee of Treadwell vs. Tyler (Conn.) 2 N. B. R., 101.

The Court says: "It will be seen at a glance, that the 35th section renders the transfer of property of the insolvent debtor void only when the party benefitted by such transfer, or receiving it, has reason to believe both that the debtor is insolvent, and that a fraud on this act was intended.

"These two aspects of the debtors' condition and intent must concur or present themselves to the view of the creditor or vendee. The propriety of this is obvious, for under any other rule, it would be extremely dangerous for any person, however upright in his intentions, to deal with another who is embarrassed in his affairs, and temporarily even, deprived of the ability to meet his engagements.

" Insolvency as used in the law, when referring to debtors, does not mean absolute inability to pay, but present inability to meet engagements in the course of business."

Thompson vs. Thompson, 4 Cushing, 127.
Lee vs. Kilbourn, 3 Gray, 594.

" But under this section of the Bankrupt Act, they (Courts) have no authority to declare a transfer void, unless the party who receives it, has reason to believe that it was intended to prefer one creditor over another, or in some way to defeat or delay the operations of the act."

Now in this case, there is nothing in the special finding (Record, pp. 6 and 7), showing that the plaintiffs in error had any knowledge or reason to believe that

Kintzing was insolvent, or that there was any fraud on the Bankrupt Act contemplated even.

And under this special finding it cannot be held, for it does not appear, nor can it be inferred even from any thing contained in that special finding, that the plaintiffs in error, defendants below, received payment of the note by way of preference, with reasonable cause to believe Kintzing insolvent, within the meaning of the 35th section, or the other provisions of the Bankrupt Act.

After a full examination of the English and American authorities, Hubbard Judge, in Jones vs. Howland, 8 Metcalf, 377, deduces the following, as the true rule:

"The result of these cases is the drawing of a distinction between an actual insolvency and a contemplated bankruptcy; between the payment of a just debt in course of business, though insolvency exists, and is known to the insolvent, and a design to give a preference in view of stopping payment. And in view of all the authorities, we hold the law to be this: that though insolvency exists, yet if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue."

III.

1. Even if there was anything to show that the plaintiffs in error were aware that Kintzing was embarrassed at the time of the composition, yet they had a right to presume that, by the composition, he had been relieved. The only object a debtor can have in compromising with creditors, is to secure a safe position, in which he can be enabled to meet his obligations, and the plaintiffs in error are certainly justified in thinking that this had been accomplished by the composition.

Under this view of the case, which is only a fair one, the well-known law laid down in Montagu on Composition applies, that: "A creditor who obtains property from his debtor in *fraud of a composition*, but not in contemplation of bankruptcy, cannot be compelled to refund such property to the assignees, under a commission of bankruptcy afterwards issued against the debtor."

Montague on Comp., p. 39, (Ed. 1823.)

This doctrine must apply more strongly when there is, as has been shown in the present case, neither fraud of a composition nor contemplation of bankruptcy.

The learned Court is also cited to Wheelright vs. Jackson, 4 Taunt., 109.

In the present case, there was no fraud of a composition, inasmuch as the plaintiffs in error, defendants below, did not sign it, nor was there any contemplation of bankruptcy.

IV.

1. There was no fraudulent preference in this case.

If there was any fraudulent preference given to any one, it was not to the plaintiffs in error, but to the endorser, Wilcox, who was ultimately liable to the plaintiffs in error.

2. The plaintiffs in error were not benefitted. The person benefitted by that preference, if there was any, was the endorser, Wilcox, and not the plaintiffs in error. Therefore, the recourse of the assignee of the bankrupt, the defendant in error here, is against that endorser, and he cannot recover back that money from the plaintiffs in error.

It has been held that,

"Where a bankrupt, in contemplation of bankruptcy, pays money to his banker, to redeem bills of exchange in his hands, for the payment of which A. is ultimately liable, with a view to make a fraudulent preference to A., the assignees cannot recover back the amount from the bankers."

Abbott vs. Pomfret, 1 Scott, 470.
1 Bing. N. C., 462.
1 Hodges, 24 (Eng.)

The same doctrine should apply to promissory notes.

In the case of Ahl *et al.* vs. Thorner, (Ohio) 3 N. B. R., 29, it was held that,

"The payment of a note held by a bank is a fraudulent preference to the endorser, if the bank is ignorant of debtor's insolvency."

There is nothing in this case to show that plaintiffs in error, defendants below, when they received payment of this note, knew of the insolvent condition of Kintzing. He had been relieved of thirty per cent. of his indebtedness. He was still engaged in business. There is nothing in the circumstances of the case from which it can be inferred that the plaintiffs in error had any design or intent to gain any preference or benefit by receiving payment of the note. On the contrary, the presumption is the other way, for they would not have run any such risk, being already fully secured by a solvent endorser upon the note.

The presumption, therefore, is, that they received the money, believing that they were compelled to do it, because tendered by the maker of the note, and not with any intention to gain any preference over any one, or in any way to defeat the Bankrupt Act.

And again, we maintain that the compromise hav-

ing been effected, and its terms having been carried out for nearly six months before the bankruptcy, the creditors who signed it and acted under it, *waived* their right to invalidate the same.

Respectfully submitted,

RICHARD H. SPENCER,

Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

(No. 171.)

THOMAS J. BARTHOLOW, et ali.,

Plaintiffs in Error.

vs.

WILLIAM C. BEAN, Assignee of CHARLES S. KINTZING, Bankrupt,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The facts of this case are succinctly stated in special finding of District Court, on pages 6 and 7 of printed record.

I. The payment complained of, by defendant in error, was made within four months before the commencement of proceedings in bankruptcy against Kintzing, viz: on the ninth day of August, 1869. The petition in bankruptcy was filed September 17th, 1869.

II. Kintzing, the bankrupt, was insolvent at the date of such payment.

III. The payment was not made in the usual course of business of said Kintzing.

It was a payment of commercial paper, by the maker, more than four months after maturity thereof, the liability of the accommodation endorser thereon having been fixed by his waiver of protest. Such payment, under section 35 of the Bankrupt Act, is *prima facie* in fraud of the act; and the Assignee is entitled to recover the amount so paid, unless it appear, by the special finding, that the payment was not made with a view to give a preference to plaintiffs in error, or to Wilcox, the endorser; or, if made with such view, that plaintiffs in error had no reasonable cause to believe Kintzing insolvent at that time, or that he made the payment in fraud of the provisions of the Bankrupt Act. The District Court did not so find.

IV. But the record exhibits more than an unrebutted *prima facie* case against plaintiffs in error. The special finding shows conclusively that plaintiffs in error not only had reasonable cause to believe, but, by legal intendment, must have known, Kintzing's insolvent condition on the ninth day of August, 1869.

One of the plaintiffs in error, Benjamin W. Lewis, jr., was a member of the firm of Lewis, Bros. & Co., which firm signed the composition deed of Kintzing & Co., agreeing to accept, in full payment and satisfaction, 70 per centum of the indebtedness of that firm, in equal instalments, at six, twelve, and eighteen months respectively. The composition agreement contained this assertion: "We have entered into this compromise, &c., after hearing and seeing a statement of Kintzing & Co.'s books, assets and effects, and find that it is the best, in our judgment, that can be done for the interest of all concerned." It was an express condition, that the composition was "not to be binding on any one unless agreed to and signed by all of the creditors of said firm."

The clause of the agreement containing these words, "We have full confidence in the integrity of Charles S. Kintzing, and his ability to settle up the business better than any one we could appoint," shows the intent of the creditors to have been to place the assets of the firm in *his* hands (not in the hands of C. S. Kintzing & Co.), in trust to carry out the terms of the composition. This worked a dissolution of the firm.

Plaintiffs in error, then, are estopped from denying, and must be presumed to have known, that Kintzing had been placed in charge of the assets of the firm; that seventy cents on the dollar was the most that those assets could pay; and that the composition could not, and did not, operate to make Kintzing, or Kintzing & Co., solvent, by reason of the fact that it was invalid, because they, the plaintiffs in error, had not agreed to and signed it.

The fact that Kintzing allowed the note to remain unpaid four months after maturity is significant in this connection, and of itself should have been sufficient to satisfy reasonable men of his insolvency, notwithstanding his pretended composition.

Under these circumstances, plaintiffs in error must be presumed to have had reasonable cause to believe that the payment was made to them with a view to give them a preference, and in fraud of the provisions of the Bankrupt Act.

Toof v. Martin, 13 Wallace, 40.

V. Kintzing must have known, on the ninth day of August, 1869, that he was insolvent, and unable to pay his creditors in full.

His compromise paper, to the amount of $25,000, matured nine days thereafter, and was not paid. He paid plaintiffs in error the full amount of their demand, with interest, only nine days before his failure to pay 23⅓ per centum of the major part of his remaining indebtedness, pursuant to the terms of his composition.

He knew that his composition was invalid, because "not agreed to and signed by all of the creditors of said firm."

He must therefore be held to have made the payment complained of with a view to give a preference to plaintiffs in error, and in fraud of the provisions of the Bankrupt Act.

Toof v. Martin, 13 Wallace, 40.

VI. Defendant in error, then, upon the finding, was entitled to recover the amount paid plaintiffs in error, because, at the date of said payment, Kintzing was insolvent, and the payment was made within four months before the proceedings were commenced in bankruptcy, with a view to give a preference to plaintiffs in error, they having reasonable cause to believe Kintzing insolvent, and that he made the payment in fraud of the provisions of the Bankrupt Act.

Toof v. Martin, 13 Wallace, 40.

VII. If it be claimed that the condition in the composition deed, as to its being "agreed to and signed by *all* the creditors of said firm," did not refer to such creditors as had security (viz., accommodation endorsers), and hence the deed was not invalid by reason of the failure on the part of plaintiffs in error to sign it, the answer is—

1st. That unless such instruments expressly exclude creditors holding securities, they are to be construed as applying to all creditors, whether holding securities or not.

Cobleigh v. Pierce, 32 Vt. 788.

2d. That it does not appear from the special finding that plaintiffs in error were the only creditors who did not sign, and it was incumbent upon plaintiffs in error to have conclusively shown the validity of the composition deed in order to base thereon a defence to this action.

3d. That the *prima facie* case still stands unrebutted, even though the composition deed were valid, because, even under the composition deed, Kintzing was insolvent, and plaintiffs in error had reasonable cause to believe him insolvent, and intending a fraud on the act by his payment, from the fact that he did not meet this obligation at maturity, but allowed the note to lie over in their hands, dishonored, for more than four months.

VIII. If it be claimed that the payment to plaintiffs in error did not, and could not, operate as a preference to them, because they had recourse on a solvent endorser, whose liability had been determined by waiver of protest, and hence they are not liable in this action, the answer is—

1st. It was equally a fraud upon the Bankrupt Act whether plaintiffs in error could have otherwise obtained all their debt or not. The payment, whether made by Kintzing first to the endorser and by him to plaintiffs in error, or directly to plaintiffs in error, thus releasing the endorser, could

only result in inequality in the distribution of Kintzing's assets; and this inequality it is the policy of the Bankrupt Act, and particularly of the 35th section, to avoid.

2d. Plaintiffs in error could have obtained payment of the note from Wilcox, the endorser, without infringement upon the Bankrupt law, or incurring any liability of being called upon to refund the amount received. They elected to collect the amount from Kintzing, and thus reduce the fund for other creditors. Equity would seem to require them to look to the endorser, against whom the other creditors had no claim, rather than to a fund from which alone the other creditors could receive anything on their demands. If the endorser had paid them, he could have looked to Kintzing in turn, but only *pari passu* with the other creditors.

3d. If not, within the meaning of the 35th section, a preference of plaintiffs in error, this was *indirectly* a payment to and a preference of Wilcox, the endorser. The comprehensive terms of the 35th section denounce as void, payments by an insolvent, *indirectly* made with a view to give a preference to any person "who is under any liability for him," and provide that the assignee may recover the same "from the *person so receiving it, or so to be benefited.*" The assignee, then, in such cases, has his election, either to pursue the endorser, who is benefited, or the holder of the note, who receives payment from the insolvent. This is not a case in which, by refusing to receive the money from Kintzing on the ninth of August, 1869, plaintiffs in error would have released the endorser from liability. His liability had, months before, become fixed by waiver of protest.

4th. The facts developed in the special finding clearly indicate a conspiracy on the part of Kintzing, Wilcox, and plaintiffs in error, to secure from Kintzing's estate, in fraud of the Bankrupt law, and in fraud of the composition deed, by which Kintzing had obtained six, twelve and eighteen months extensions for seventy per cent. of his indebtedness, the payment in full, with interest, of this $2,500 note. The Court should not allow such a conspiracy to defeat the policy of the Bankrupt Law, as to equality in distribution of assets independently of the terms of the 35th section.

IX. The facts that the note held by plaintiffs in error was originally a copartnership indebtedness, and that Lindsley, the other member of the firm, was never adjudicated a bankrupt, do not enure to the benefit of plaintiffs in error:

1st. Because, after the dissolution of the firm (the fact of which dissolution, and their knowledge and acquiesence in it at the time, plaintiffs in error, as we have seen, are estopped to deny), the indebtedness of the firm became Kintzing's individual indebtedness, and the assets of the firm his individual assets, with which to meet such indebtedness.

Bean v. Amsinck, 10 Blatchford, C. C. R. 361 (A case growing out of this same Bankrupt estate.)

In the matter of Wm. Downing, 1 Dillon, C. C. R. 33.

2d. Lindsley was not a necessary party to the Bankruptcy proceedings. He had parted with all interest in the assets of the firm. He was in debt to the firm. If possessed of any individual property, subject to levy and execution, he could have been proceeded against by Kintzing's assignee, and the property so obtained would have gone to swell the fund for distribution among Kintzing's creditors.

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